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No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM 1997

PHILIP COATES, DIRECTOR OF THE
MASSACHUSETTS DIVISION OF MARINE FISHERIES, ET AL.,
Petitioners,

v.

RICHARD MAX STRAHAN,
Respondent.

PETITION FOR A WIRT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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ISSUES PRESENTED.

1. Whether state regulatory officials commit a "taking" under the federal Endangered Species Act ("ESA" or "the Act") by enacting and enforcing regulations that protect endangered whales in some ways, but do not eliminate all risk that private, state-licensed fishermen might violate the ESA.

2. Whether, if construed to make state regulators liable for such decisions, the ESA violates the Tenth Amendment to the United States Constitution and constitutional principles of federalism, as most recently construed in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 117 S. Ct. 2365 (1997).

3. Whether, in a case against state regulatory officials, the proximate cause requirement of the ESA (*Babitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995)) is met by showing that the State licenses private actors who may proceed to violate the ESA in contravention of both state and federal law.

PARTIES TO THE PROCEEDING.

The plaintiff is Richard Max Strahan. The defendants are Philip Coates, Director of the Massachusetts Division of Marine Fisheries ("DMF"); Trudy Coxe, Secretary of the Massachusetts Executive Office of Environmental Affairs ("EOEA"); and John Phillips, Commissioner of the Massachusetts Department of Fisheries, Wildlife, and Environmental Law Enforcement (the "Department"). The Conservation Law Foundation, Inc. appeared and argued as amicus curiae in support of the plaintiff in both the District and Circuit Courts.

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PHILIP COATES, DIRECTOR,
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RICHARD MAX STRAHAN,
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PETITION FOR A WRIT OF CERTIORARI

The defendants, Philip Coates, Director of DMF; John Phillips, Commissioner of the Department; and Trudy Coxe, Secretary of EOEA (collectively the "defendants") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the First Circuit is reported at 127 F.3d 155 (1997) and is reproduced as Appendix A ("App. A") hereto. The decision of the United States District Court for the District of Massachusetts is reported at 939 F. Supp. 963 (1996) and is reproduced as Appendix B ("App. B") hereto.

JURISDICTION.

The judgment of the United States Court of Appeals for the First Circuit was entered on October 9, 1997, and rehearing was denied on December 8, 1997. App. A-1; C-1. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1). The First Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1292(a)(1). Section 2403(a) of 28 U.S.C. may apply, and the notification required by Supreme Court Rule 29.4(b) has been made.

STATUTORY PROVISIONS INVOLVED.

U.S. CONSTITUTION AMENDMENT X

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

16 U.S.C. § 1532(19)(1986).

The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

16 U.S.C. § 1538(a)(1).

Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United Staters to --

. . . . .

(B) take any such species within the United States or the territorial sea of the United States[.]

16 U.S.C. § 1539(a)(1).

The Secretary, may permit, under such terms and conditions as he shall prescribe --

. . . . .

(B) any taking otherwise prohibited by section 9(a)(1)(B) [16 U.S.C. § 1638(a)(1)(B)] if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

50 CFR § 17.3 (1994).

Harm in the definition of 'take' in the Act means an act which actually kills or injures

> wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.

STATEMENT OF THE CASE.

1. Procedural History.

Richard Max Strahan ("Strahan") originally filed suit on April 21, 1995, and sought a preliminary injunction: (1) ordering agencies of the Commonwealth of Massachusetts ("Commonwealth") to revoke all previously issued licenses and permits authorizing gill net and lobster pot fishing; and (2) barring the Commonwealth from issuing any such licenses and permits in the future unless it received incidental take and small take permits from the National Marine Fisheries Service ("NMFS") under the ESA and Marine Mammal Protection Act ("MMPA"). App. B-4 to 5.[1] The District Court had

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[1] As later amended, the Complaint contains four counts. App. B-4 n.7. Count I claims that the Commonwealth violates Section 9 of the ESA because its "licensing and regulation of fishing gear in Massachusetts coastal waters allegedly results in incidental takings of Northern Right whales without a permit." *Id.* Count II claims that the Commonwealth's "licensing of gillnets and lobster gear in the NMFS-designated critical habitat of Massachusetts Bay is an impermissible modification of that habitat." *Id.* Count III claims that the Commonwealth violates Section 103 of the MMPA because its licensing and regulation

jurisdiction over this case pursuant to 28 U.S.C. § 1331. The Conservation Law Foundation ("CLF") has participated in briefing and oral argument as amicus curiae in the District Court and the Court of Appeals at all significant phases of this litigation, supporting what it views as "an attempt to force officials of the Commonwealth of Massachusetts to adopt measures to protect several types of whales," including right whales. 1st Cir. Appendix ("R.A.") 179.

On September 24, 1996, over the defendants' objection, the District Court entered a preliminary injunction, "with a view toward developing additional protective measures" for the Northern Right Whale and other endangered whales. App. B-69 to 74. The Court ordered the defendants to: (1) "apply for an incidental take permit from NMFS [under the ESA] on or before October 18, 1996, . . . for Northern Right whales"; (2) "apply for a [small take] permit under the [MMPA] on or before October 18, 1996, . . . for Northern Right whales"; (3) "submi[t] to the court on or before December 16, 1996, [a plan] to restrict, modify or eliminate the use of fixed-fishing gear in coastal waters[2] of Massachusetts listed as critical habitat for

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of fishing gear in Massachusetts coastal waters "allegedly results in the entanglement of Northern Right whales in fishing gear." *Id.* Count IV claims that the Commonwealth authorizes whale-watching activities in violation of Section 9 of the ESA. *Id.*

[2] Massachusetts "coastal waters" are "all waters of the commonwealth within the rise and fall of the tide and the marine limits of the jurisdiction of the commonwealth," Mass. Gen. Laws c. 130, § 1, and within "three geographical miles from the

Northern Right whales"; and (4) "convene an Endangered Whale Working Group to engage in substantive discussions with the plaintiff, or his representative, as well as with other interested parties, regarding modifications of fixed-fishing gear and other measures to minimize harm to the Northern Right whales." *Id.* The District Court declined to enjoin the Commonwealth's licensure of gill net and lobster pot fishing.

On October 1, 1996, the defendants appealed from the District Court's preliminary injunction. R.A. 249-52.[3]

In October, 1996, the defendants applied for permits from NMFS under the ESA and MMPA for the incidental take of Northern Right Whales in Massachusetts coastal waters and nominated members to the District Court's Endangered Whale Working Group pursuant to par. 4 of the District Court's preliminary injunction. R.A. 274-75. On October 29, 1996, the District Court entered an order designating the members of the Working Group. R.A. 293A-B.

On November 4, 1996, Strahan moved for contempt against the defendants contending that their October 17, 1996 incidental take application to NMFS was a "sham" and violated paragraphs 1 and 2 of the District Court's preliminary injunction. R.A.

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shoreline." 322 Code Mass. Regs. § 8.02. No one may engage in commercial fishing activities in Massachusetts coastal waters unless they are licensed by the Commonwealth's Division of Marine Fisheries. R.A. 32-50.

[3] Strahan also appealed from the preliminary injunction on October 18, 1996. R.A. 19.

298-314. [4]

The District Court's Working Group met in November and December, 1996. R.A. 362-404. As a result of the Working Group's meetings, the defendants, on December 16, 1996, submitted a plan to the District Court pursuant to par. 3 of the District Court's preliminary injunction. The District Court did not enter further orders, but retained oversight authority over the Commonwealth's regulatory efforts and measures.

After all parties filed notices of appeal from the September 24, 1996 preliminary injunction ruling, the Court of Appeals for the First Circuit issued a decision on October 9, 1997, affirming the District Court in relevant part. *See* App. A. The Court of Appeals agreed with the District Court "that a governmental

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[4] On November 29, 1996, NMFS issued a notice acknowledging its receipt of the Commonwealth's October 17, 1996 incidental and small take permit application and inviting public comment on the application. R.A. 340-61; 61 Fed. Reg. 64500 (December 5, 1996). In doing so, NMFS restated its earlier policy statement of May 28, 1996 that "it was unnecessary and inappropriate for Massachusetts to apply" for such permits, but invited public comments on its position. 61 Fed. Reg. at 64503. No comments were received during the public comment period, which ended on January 6, 1997. 61 Fed. Reg. at 64501; 62 Fed. Reg. 5385, 5386 (February 5, 1997).

On January 28, 1997, NMFS reaffirmed its policy statement, *See* 1st Cir. Supplemental Record Appendix ("SRA") 1-2, and made that statement final on February 5, 1997, *see* 62 Fed. Reg. at 5385-86. NMFS restated its policy position again on April 8, 1997. *See* 62 Fed. Reg. 16789 (April 8, 1997).

third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA." App. A-16, citing, *inter alia*, *Palila v. Hawaii Dept. of Land and Nat. Resources*, 639 F.2d 495, 497-98 (9th Cir. 1981)("*Palila I*"). It rejected the defendants' argument that their regulatory scheme did not proximately cause private actors to violate the ESA, holding that the "causation here while indirect, is not so removed that it extends outside the realm of causation as it is understood in the common law." App. A-17 to 18. It likewise disagreed with the defendants' position that it should defer to NMFS or recognize that additional regulation, if mandated by the ESA, should come from NMFS. App. A-18 to 19. Finally, it rejected the defendants' factual arguments, because, among other things, the "evidence of the significant efforts made by the Commonwealth to 'minimize Northern Right Whale entanglements in fishing gear' . . . [is] irrelevant" as long as there was evidence of whale entanglements and of at least "a single injury to one whale." App. A-21 to 22.[5]

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[5] The decision below states that "it is not possible for a licensed commercial fishing operation to use its gillnets or lobster pots in the manner permitted by the Commonwealth without risk of violating the ESA by exacting a taking." App. A-17. The District Court did not make this assertion, and there is no support in the record for it. On the contrary, the lower court found (and the First Circuit affirmed) "that the Commonwealth's probable violation of the ESA could be curtailed without such extreme measures" as halting fixed gear fishing. App. A-37. Consistent with this conclusion, the panel upheld the lower Court's finding that "northern right whales are

Viewing the defendants' Tenth Amendment arguments as relating primarily to remedy, the Court rejected an analogy to *New York* and *Printz* because it believed that two distinguishing facts existed. First, it believed that there was a statutory violation in this case, unlike in the other two cases. App. A-26 to 27, 32 to 33, citing, *inter alia*, *Palila v. Hawaii Dept. Of Land and Natural Resources*, 852 F.2d 1106 (9th Cir. 1988)("*Palila II*"). Second, the States in those cases were directed "to take positive action with respect to a particular field" while, here, the defendants were directed "to find a means of bringing the Commonwealth's scheme into compliance with federal law." App. A-33. It also argued that the Commonwealth could be put to a choice of regulating according to ESA standards or having its regulations preempted by the ESA and regulations. *Id.*

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rarely seen in Cape Cod Bay after May 15." App. A-37, affirming 939 F. Supp. at 968. *Cf.* App. A-5 (NMFS proposes banning fixed gear in the Cape Cod Bay Critical habitat only from January 1 to May 15 and in the Great South Channel only from April 1 to June 30 of each year).

2. *FACTS.*

A. *Federal Enforcement of the ESA off the Massachusetts Coast.*

The United States Secretary of Commerce (the "Secretary"), through NMFS, is responsible for enforcing the ESA with respect to endangered species of marine mammals. *Incidental Take of Endangered, Threatened and Other Depleted Marine Mammals*, 54 Fed. Reg. 40,338 (1989); *see also* 16 U.S.C. § 1362(12); App. B-18 The ESA authorizes NMFS to promulgate regulations designating critical habitats of endangered species. 16 U.S.C. § 1533(a)(3).

On June 3, 1994, NMFS designated portions of Cape Cod Bay as a critical habitat for the Northern Right Whale. 59 Fed. Reg. 28,793, 28,797-8 (1994). Portions of Massachusetts coastal waters are located in Cape Cod Bay. R.A. 184A. The designation, however, banned neither whale watching, nor commercial fishing activities in the area, nor the use of gill nets or other fishing gear. 59 Fed. Reg. 28,798-804 (1994).

> [The critical habitat] designation contains no land use or fishing regulations, and will not directly affect private activities . . . If, in the future, NMFS determines that restrictions on human activities are necessary to protect northern right whales or their habitat, such action would be preceded by an opportunity for public review and comment.

59 Fed. Reg. 28,804.

Notwithstanding the ESA's prohibitions, NMFS "may

permit . . . any taking otherwise prohibited by [the ESA] if such taking is incidental to, and not for the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(1)(B).[6] Currently, NMFS has no regulations requiring the Commonwealth to apply for an incidental take permit prior to licensing any type of commercial fishing in its coastal waters. On May 28, 1996, NMFS advised the Commonwealth that:

> when appropriate, [NMFS] will issue incidental take authority for commercial fishing operations to individual fishermen . . . [I]t is inappropriate and unnecessary for the Commonwealth to apply for [such] a permit.

R.A. 205-6.[7] It also advised the Commonwealth that "it does not anticipate issuing any incidental take [permits] . . . with respect to right whales." *Id.*[8]

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[6] NMFS may also issue "small take" permits under the MMPA that authorize "the incidental taking . . . of marine mammals in the course of commercial fishing operations." 16 U.S.C. § 1374(a).

[7] *See* above, p. 7 n. 4.

[8] In August, 1995, NMFS published a notice in the Federal Register that it would not issue incidental take permits for Northern Right whales because it could not find that incidental takings of these whales would have a negligible impact on their survival. *Taking of Threatened or Endangered Marine Mammals Incidental to Commercial Fishing Operations; Interim Permit*, 60 Fed. Reg. 45399

B. *Massachusetts' Protective Regulatory Measures.*

Massachusetts has long made it illegal to take any federally listed endangered species. Mass. Gen. Law c. 131A, § 2, added by Mass. St. 1990, c. 408, § 4. Northern Right Whales are listed as endangered species under state marine fisheries law. 321 Code of Mass. Regs. § 10.60. *See* R.A. 143.

In addition, the Commonwealth has a long history of regulatory measures designed to protect the Northern Right Whale. R.A. 144-49, 184-184A. NMFS' critical habitat designation "recognizes and appreciates the efforts of the Commonwealth of Massachusetts to protect the Northern Right Whale." 59 Fed. Reg. 28,793, 28,801 (1994).

The Commonwealth's measures to protect Northern Right Whales include: (1) establishment of a 500 yard buffer zone between Right Whales and fishing vessels;[9] (2) distribution of educational information to licensed commercial fishermen and

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(August 31, 1995). NMFS repeated its position on November 29, 1996. R.A. 350.

[9] *See* 322 Code of Mass. Regs. § 12.01-12.05 (1993). There was no federal buffer zone for whales at the time Massachusetts adopted this measure. R.A. 36-7. On December 27, 1994, NMFS proposed adopting a 500 yard "protection zone" around every Northern Right Whale and a 100 yard "protection zone" around other whales. 59 Fed. Reg. 66,513, 66,514 (1994). NMFS has now adopted the proposal as a regulation. *See North Atlantic Northern Right Whale Protection; Interim Final Rule*, 62 Fed. Reg. 21562 (April 25, 1997)

owners of Massachusetts registered boats on the importance of identifying, avoiding, and reporting entanglements of Northern Right Whales; (3) requesting agencies with jurisdiction over ocean dumping activities to recognize the impacts of such activities on Northern Right Whales in identified high use areas within Cape Cod Bay; and (4) encouraging and supporting NMFS' designation of the Cape Cod Bay critical habitat in 1994. R.A. 145-46, 184-84A.

The Commonwealth has specifically limited the potential for Right Whale entanglements in fishing gear. R.A. 147, 184-84A. In 1992, the Department adopted regulations that prohibited the use of more than 800 pots by coastal lobster pot fishermen at a given time. *See* 322 Code Mass. Regs. § 6.13(2). In the same year, the Department also imposed a moratorium on the issuance of new sink gill net regulated fishery permits. *See* 322 Code Mass. Regs. § 8.10(4).

The Commonwealth also established a moratorium on the issuance of new coastal lobster fishing permits, *See* 322 Code Mass. Regs. § 6.13(2), and banned the use of sink gill nets in all Massachusetts coastal waters: (a) south of Boston during the month of March, when whales usually migrate to the area to feed; (b) north of Cape Ann during the month of November; and (c) south of Cape Cod from April to November 15. *See* 322 Code Mass. Regs. § 4.08(2). In March, 1996, it initiated a program of weekly surveillance flights over the Cape Cod Bay critical habitat, with the assistance of the United States Coast Guard's Air Wing at Otis Air Force Base, from January to April of each year for the purpose of spotting Northern Right Whales and Northern Right Whale entanglements in fishing gear, and reporting such sightings to the Center for Coastal

Studies. R.A. 146-47. The Department is also formulating plans to circulate information on Northern Right Whale sightings to all Massachusetts Harbor Masters and ultimately to fixed gear fishermen, through a joint program with NMFS. *Id.*

In January, 1997, in response to the District Court's preliminary injunction, the Commonwealth adopted additional regulations. In a related case brought by the same plaintiff against NMFS and the Coast Guard, the same District Judge stated that "the Commonwealth needed some encouragement to develop its policies in this area under the ESA" and claimed credit for the Commonwealth's new regulatory measures, which he stated were adopted "under prodding from this Court." *Strahan v. Linnon*, 967 F. Supp. 581, 606 (D. Mass. 1997). The 1997 Massachusetts regulations (1) banned all gill net fishing in all Massachusetts coastal waters listed as critical habitat for Northern Right Whales from January 1 through May 15 of each year, the period when Northern Right Whales are usually present in the area; and (2) limited lobster pot fishing in the area during the same time period to individuals deploying "break away" gear or other similar gear designed to allow a Northern Right Whale to break free from lobster pot fishing gear with relative ease. R.A. 362-69, 405-7.[10] In May, 1997,

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[10] NMFS followed the Commonwealth's lead on April 1, 1997, by issuing a rule closing Federal waters to vessels fishing with sink gillnet gear and other gillnet gear in Cape Cod Bay from March 27 to May 15, 1997, and from January 1 to May 15 in subsequent years. 62 Fed. Reg. 15425, 15426 (April 1, 1997). On April 4, 1997, NMFS issued an emergency interim rule implementing restrictions on the use of lobster pot gear in the

the Commonwealth adopted a surveillance-based management plan for Northern Right Whales and adopted a policy pursuant to which the Commonwealth's EOEA Secretary would issue an annual report by October 15th of each year: (1) analyzing the effectiveness of Commonwealth's regulatory measures designed to protect Northern Right Whales; and (2) proposing any regulatory changes. R.A. 411-12.

The "Defendants do not place gill nets and lobster gear in [Massachusetts] coastal waters." App. B-39.

ARGUMENT.

The First Circuit's decision in this case conflicts with this Court's decisions in *New York v. United States*, 505 U.S. 144 (1992); and *Printz v. United States*, 117 S.Ct. 2365 (1997). In particular, the First Circuit has violated the principle that "The Federal Government may not compel the States to enact or administer a federal regulatory program." *New York*, 505 U.S. at 188. The ruling in this case is particularly egregious, because it seeks to compel Massachusetts to work toward enacting additional regulatory measures that NMFS, the responsible federal agency, had declined to enact. This ruling also raises issues of national importance regarding the roles of the States and all three branches of the Federal Government, including the question whether the Federal Courts may impose affirmative regulatory obligations, not upon federal executive

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Cape Cod Bay Right Whale critical habitat from April 1 to May 15, 1997. 62 Fed. Reg. 16108 (April 4, 1997).

agencies, but upon the States, based solely upon alleged shortcomings in state regulation, when compared with the ESA.

The First Circuit's decision also goes well beyond notions of proximate causation inherent in the federal ESA and its regulations. *See Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 696 n.9, 700 n.13, 709-714 (1995); 50 C.F.R. § 17.3. While the majority in *Sweet Home* did not reach the issue, it appears that at least four Justices have rejected the broad proximate causation theory embraced by the Circuit Court. *See* 515 U.S. at 709-714 (O'Connor, J., concurring)(questioning *Palila II*); 515 U.S. at 714-36 (Scalia, J., dissenting, joined by Rehnquist, C.J. and Thomas, J.).

Accordingly, the Court should grant certiorari to review the First Circuit's decision. Despite the interlocutory nature of the ruling below, this case presents several "important and clear-cut issue[s] of law that [are] fundamental to the future conduct of the case. . . ." Stern & Gressman, *Supreme Court Practice*, § 4.18, p. 196 (7th ed. 1993) and cases cited.

A. *The Decision Below Conflicts with New York and Printz by Construing a Federal Statute to Require Additional State Regulatory Measures.*

The defendants here have done nothing more than exercise state licensing and regulatory power over private economic activity. There is no allegation that any aspect of their regulations has placed endangered whales in greater jeopardy than they would be without state regulation. Indeed, as demonstrated at length above, the defendants have expressly

prohibited takings of endangered species and have enacted regulations to protect whales. If they had done nothing, and thereby left fixed gear fishing unregulated at the state level, they would not be liable under the ESA. App. B-41. Their only alleged omissions consist in declining to take *additional* state regulatory measures.[11] Nevertheless, holding that Massachusetts' "efforts to minimize [whale] entanglements are irrelevant" (App. A-22) as long as any risk of taking existed, the First Circuit found that "the Commonwealth's regulation of commercial fishing" violates the ESA. On this view, Congress has made the States insurers against private ESA violations.

A federal obligation requiring a State to regulate to eliminate all risk of private ESA violations cannot be grounds for liability under the Act; otherwise, the ESA would violate the States' reserved authority under constitutional principles of federalism, including the Tenth Amendment to the United States Constitution. *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 117 S. Ct. 2365 (1997). In *New York*, this Court invalidated a federal statute requiring states to regulate further or to take title to low level radioactive waste, because "The Federal Government may not compel the States to enact or administer a federal regulatory program." 505 U.S. at 188. *Accord*, *Acorn v. Edwards*, 81 F.3d 1387 (5th Cir. 1996), *cert. denied sub. nom. Acorn v. Foster*, 117 S. Ct. 2532

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[11] Without judicial ability to impose such measures, Article III standing would not exist here, because the Court would not be able to redress alleged injury to whales. App. B-39 (alleged violation is "redressable" "[i]f the Defendants were to limit further or ban . . . the use of gillnets and lobster gear").

(1997). In *Printz*, the Court struck down provisions of a statute that imposed obligations upon local officials to take certain actions holding that "Congress may not circumvent [the] prohibition [of *New York*] by conscripting the State's officers directly." 117 S. Ct. at 2379.

The fundamental conflict between the decision below and *New York* and *Printz* lies in the lower court's attempt to justify federal control over state regulatory choices by characterizing *failure to regulate* at the state level as a continuing federal violation. The lower federal courts must not be permitted to circumvent *New York* and *Printz* in this manner.

To be sure, the First Circuit did try to justify its departure from *New York* and *Printz*. Its rationales must be rejected as inconsistent with those decisions, however, because ultimately the Court found liability only due to the supposed absence of enough state regulations to achieve the ESA's goals.[12]

The Circuit Court first attempted to avoid the rule of *New York* and *Printz* by characterizing the State's regulatory activity here as a "continuing violation." App. A-26 to 27, 31 to 33.

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[12] This conclusion also follows from process of elimination. The prohibition of state licensure and regulation cannot be the ESA's goal, because it would fail to "redress" the alleged harm, and would, instead, cause greater jeopardy to endangered species. The panel (App. A-18 n.3) expressly disclaimed premising liability upon a theory that gillnets and lobster pots must be banned by the State in areas where the federal administering agency has chosen not to ban them. The only remaining alternative is that the State is being held liable for not regulating enough.

That characterization itself contravenes this Court's decisions. In *Printz* itself, for instance, Congress had attempted to make it a federal criminal "violat[ion]" for a Sheriff to refuse to conduct a background check in connection with sales of handguns. *See* 117 S. Ct. at 2369, citing 18 U.S.C. § 924(a)(5). The question was whether Congress could do so, and this Court squarely held that it could not. In *New York* itself, the State would have been in violation of a congressional act by 1996 if it refused "to administer the federal program." 505 U.S. at 177. Neither *New York* nor *Printz* makes the circular assertion, which the First Circuit did, that a state is "in violation of a congressional act" without deciding whether the relevant feature of the federal act is constitutional.

The Circuit Court's second ground for distinguishing *New York* and *Acorn* (App. A-33) is that the "states in those cases were directed to take positive action with respect to a particular field." This distinction, too, fails. Here, as shown above, the defendants are being held liable for taking some, but not enough licensing and regulatory measures with respect to a particular field, namely the protection of federal endangered species. It is true that the requirement in this case for more regulation does not explicitly appear in so many words in the Act or the opinion below, but the panel has now construed the ESA to contain such a requirement as a matter of congressional mandate upon state licensing and regulatory authorities. This construction, falls squarely within the proscription against requirements to "regulat[e] according to the instructions of Congress." *New*

York, 505 U.S. at 175.[13]

In truth, Congress meant for NMFS to decide whether additional regulation was necessary. NMFS's view, which the lower courts have ignored, is that because the Commonwealth's role is regulatory it is "inappropriate and unnecessary" for it even to apply for an incidental take permit. *See* above, p. 7, n.4. *See Sweet Home*, 515 U.S. at 703 (Deference to federal agency administering the ESA). Congress intended any such regulation to originate from the Federal executive branch, not the judiciary through orders to state agencies. The correct construction of the ESA, which avoids constitutional conflict with *New York* and *Printz* (see *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council,* 485 U.S. 568, 575 (1988)), is that state regulators are not liable when some risk exists that the acts of private licensees may violate federal law.

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[13] The lower court cannot excuse an unconstitutional basis for imposition of liability on the State on the ground that there is, as yet, no specific judicial order for regulatory action. Since *liability* here was predicated upon failure to regulate enough, the situation here closely resembles *New York* itself, where the State challenged its liability under the federal act in a declaratory judgment action, in which no relief at all had entered against the State. Nor had relief entered against the states in *Printz* or *Acorn*.

B. *The Panel's "State Authorization" Theory Raises Issues of National Importance and Conflicts with New York and Printz.*

The Circuit Court's opinion relies heavily upon the theory that a State authorizes and may therefore be held liable for illegal activity by issuing a license to private citizens to engage in a use of fishing gear that can result in whale entanglements. It characterizes the State as "a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species . . . ." App. A-16. This conception of state authorization raises fundamental questions regarding the role of the States, as regulators, in relation to private individuals' independent obligations to comply with federal law. It also raises basic issues regarding the nature of our political systems and freedoms. The First Circuit's "state authorization" theory calls out for review by this Court in order to address an issue of national importance and correct a further conflict with *New York* and *Printz*.

If States, through their historic licensing and regulatory powers, become federally liable for "authorizing" private violations of Federal law, then numerous troubling consequences may follow. Many state licensing functions could be pressed into federal service by the Courts, with the goal of inducing additional state regulations that the responsible federal agencies have eschewed, as in this case. For instance, the First Circuit's rule would call into question the common sense understanding that state licensure of firearms, including hunting rifles, does not authorize or cause the taking of endangered land species, even though most hunters would not kill an endangered

species "but-for" the State's firearms license.[14] Similarly, the State does not authorize Medicare fraud by licensing physicians and other health professionals to practice, even though these professionals usually would need such a license in order to make their fraud effective. Nor does a State authorize violations of federal environmental laws by licensing hazardous waste cleanup professionals some of whom may end up violating those laws. In each case, the State is entitled to rely upon the responsibility of the individuals it licenses to comply with federal laws.

In order to avoid such dislocations of federal and state control, the law, including most prominently, *New York* and *Printz* has rejected the First Circuit's theory.[15] There are many defects in the decision below on this point.

First, as a matter of law and fact, the Commonwealth does

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[14] Even the First Circuit recognized, however, that a states' Registry of Motor Vehicles cannot be held liable for private use of registered automobiles to commit federal crimes. App. A-16 to 17. The Circuit Court's attempt to distinguish the Registry situation misses the crucial point that the only manner in which the state has licensed fishing nets and pots is in a manner that seeks to *avoid* taking whales.

[15] It is therefore unnecessary to solve the puzzle of how NMFS "expressly declined to ban gillnet or lobster pot fishing in Cape Cod Bay" without making "a policy determination . . . that such a ban is unnecessary." App. A-19. It is certainly not the case that, if such a ban is necessary, it must be imposed by the State, in preference to federal regulation.

not grant "authority" to fish in a manner that takes endangered species.[16] On the contrary, it has *prohibited* fishermen from taking any endangered species "listed under the Federal Endangered Species Act." Mass. Gen. Laws c. 131A, § 2. The Commonwealth has taken many other regulatory measures to protect whales. 322 C.M.R. 12.00-12.05 (1993). *See* above at 12-15; App. A-6 to 7. The Commonwealth's regulatory process thus *restricts* the liberty to engage in unrestrained fishing and *prohibits* the taking of right whales. The Commonwealth cannot be said to authorize what it expressly prohibits and tries to prevent.[17]

The state authorization theory, moreover, seems to assume that no one would be allowed to fish unless the state government affirmatively authorized it. This is wrong as a matter of basic constitutional theory. In our free society, citizens may act as they wish, unless their acts are validly prohibited.[18] Where

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[16] The Massachusetts Endangered Species Act defines "take" to include acts that "harass, harm, . . . kill, trap," etc., just like the Federal Endangered Species Act. Mass. Gen. Laws c. 131A, § 1.

[17] Using the concept of "state authorization" in this way contravenes the federalist presumption that States as States do not authorize violations of law--the very presumption upon which depends the fiction of *Ex Parte Young*, 209 U.S. 123, 159 (1908), cited and applied by the Circuit Court at App. A-23 to 24, and thus the authority of the Federal Court to issue *any* injunction orders against *any* state officials.

[18] See e.g. U.S. Const., 9th and 10th Amendments; The Declaration of Independence (all citizens possess "certain

federal obligations are concerned, individuals owe responsibility directly to the federal government. *New York*, 505 U.S. at 165-66. Consistent with this conception of federalism and of individual freedom, the States must be free to license private activity and rely upon the private actors to comply with federal law.

To hold that the State's licensure of private activity (particularly with the safeguards described above) has authorized federal violations and thereby subjected the Commonwealth to court supervision of its licensing and regulatory processes is to enlist the States in an intermediate role between citizens and their federal government. *New York* irreconcilably conflicts with the Circuit Court's approach on this point. 505 U.S. at 163, 168-69, 176, 188. *See also The Federalist Papers* Nos. 15, 21 (Hamilton).[19]

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unalienable Rights"). The First Circuit's contrary assumption harks back to the now-rejected fiction that the King (now the Commonwealth) owns all the free-swimming fish in its territorial waters, but that fiction has now been replaced by the acknowledgment that the Commonwealth's power is not proprietary, but regulatory. *Toomer v. Witsell*, 334 U.S. 385 (1948).

[19] The First Circuit's attempt to rely upon preemption principles (App. A-25 to 28) founders at the outset, because the ESA does not purport to preempt state regulations that leave some risk of private ESA violations. Compare *FERC v. Mississippi*, 456 U.S. 742, 764 (1982)(statute conditioning state regulation "in a pre-emptible field upon the consideration of federal proposals."). Moreover, the lower courts could not

C. *The Panel's "Common Law Causation" Theory Conflicts with Sweet Home, as well as New York and Printz.*

The lower court also purports to rely upon common law causation principles (App. A-15 to 17). Its theory not only is a novel construction of proximate cause under the ESA but also conflicts with *Babbitt v. Sweet Home Chapter of Community for a Great Oregon*, 515 U.S. 687 (1995), particularly as understood by Justice O'Connor in her concurrence. 515 U.S. at 712 (ESA incorporates common law principles of causation). "After *Sweet Home*, the proximate cause of any 'take' would be the permittee who modified the habitat, not the public official who only granted a permit." Quarles, "*Sweet Home* and the Narrowing of Wildlife 'Take' Under Section 9 of the Endangered Species Act", 26 ELR 10003, 10013 (January, 1996). *See also Pyramid Lake Paiute Tribe v. Department of the Navy*, 898 F.2d 1410, 1419-20 (9th Cir. 1990); *National Wildlife Federation v. National Park Service*, 669 F. Supp. 384, 392 (D. Wyo. 1987)(National Park Service not liable for potential takings caused by private campers disobeying the agency's rules).

The First Circuit's decision notes that the District Court found that "but for the permitting process," whale takings

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have had preemption in mind when they ordered measures aimed at additional regulation, because preemption simply precludes "enforce[ment]" of state law. *Hines v. Davidowitz*, 312 U.S. 52, 74 (1941). See *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494, 497 (1987).

"could not take place." App. A-15. Under but-for causation, large numbers of people are potentially liable for whale entanglements in fishing gear, including anyone upon whom fishing depends -- such as the sellers of fixed gear, boat builders, fuel dealers, purveyors of food to the ships' crews, lighthouse keepers, and numerous others. However, "but-for" causation does not establish causation under the common law. *Sweet Home*, 515 U.S. at 713 (O'Connor, J., concurring) ("Proximate causation depends to a great extent on considerations of the fairness of imposing liability for remote consequences."); *King v. Pace*, 575 F. Supp. 1385 (D. Mass. 1983) (holding that Commonwealth's liquor licensing agency was not liable in a wrongful death suit under 42 U.S.C. § 1983); Restatement of Torts, Second, § 431 and comment a. If it were otherwise, then the seminal case of *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), would have come out the other way. Nor does but-for causation suffice under other statutes, such as Title VII of the Civil Rights Act of 1964.[20]

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[20] Title VII achieves this result through its definition of "employer," which effectively excludes States in their regulatory capacity. *See Haddock v. Board of Dental Examiners of California*, 777 F.2d 462, 463 (9th Cir. 1985)(state board of dental examiners); *Tyler v. Vickery*, 517 F.2d 1089, 1096 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976)(state board of bar examiners); *George v. New Jersey Board of Veterinary Medical Examiners*, 635 F. Supp. 953, 956 (D.N.J. 1985), aff'd 794 F.2d 113 (3d Cir. 1986)(state board of veterinary examiners); *Woodward v. Virginia Board of Bar Examiners*, 420 F. Supp. 211, 214 (E.D. Va. 1976), aff'd 598

In addition, there is not even "but-for" causation in this case. If there were no Departmental permitting process here, then unfettered fishing would take place, and whale takings would be far more likely than they are today. The Commonwealth's current licensure and regulatory actions have placed endangered whales in a far more protected position than they would be absent state intervention. To ignore the totality of the Commonwealth's restrictions on fishing and to look only at the fact that a number of licensed individuals may fish in accordance with regulations, is akin to blaming the good Samaritan for the consequences of intervening (or for intervening unsuccessfully) to prevent harm, without considering either the benefit given or the gratuitous nature of the Samaritan's actions. The common law resoundingly rejects that approach. E.g. *Osterlind v. Hill*, 263 Mass. 73, 76; 160 N.E. 301 (1928).[21]

F.2d 1345 (4th Cir. 1979) (state board of bar examiners).

[21] The only ESA cases that the First Circuit cites (elsewhere in the opinion -- at App. A-15, 26 to 27) deal not with common law principles applied to state regulatory agencies, but with States acting in a proprietary capacity (i.e. maintaining particular animals in a sensitive habitat), *Palila I*, 639 F.2d at 497-98; *Palila II*, 852 F.2d at 1110); or with governmental entities not entitled to 10th Amendment protection (i.e. federal agencies or local agencies, *Sierra Club v. Yeutter*, 926 F.2d 429, 438-39 (5th Cir. 1991)(U.S. Forest Service); *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1301 (8th Cir. 1989); *Loggerhead Turtle v. County Council of Volusia County*, 896 F. Supp. 1170, 1180-81 (M.D. Fla. 1995)). These cases follow

Finally, state regulations do not relieve private actors of a duty to meet a higher standard of conduct. Under common law rules, private defendants may have an obligation to exercise greater care than simply complying with state and federal regulations. *See Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652, 658 (1st Cir. 1981); *MacDonald v. Ortho Pharmaceutical Corp.*, 394 Mass. 131, 139, 475 N.E. 2d 65, *cert. denied*, 474 U.S. 920 (1985), and cases cited. State regulators cannot be the proximate cause of harm under *Sweet Home* where they leave intact (and even replicate in state law) the federal duty of private actors to comply with the ESA.

In short, the Commonwealth has not increased the risk of harm to whales. Instead of doing nothing, the Commonwealth has in fact decreased that risk by regulation. Even if it has not decreased the risk of harm by private parties to zero, the common law has not, to defendants' knowledge, ever deemed state regulators to be the proximate cause of alleged harm simply because the regulators have left it up to private parties to conform their activities to federal law, such as the ESA.

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doubtful legal concepts, in light of *Sweet Home*.

Conclusion.

For the foregoing reasons, the Court should issue a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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